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A Global Law of Jurisdiction and Judgments: Views from the United States and Japan

Kevin M. Clermont†

Introduction	1
I. U.S. Approach	2
A. Basic Law	2
1. Jurisdiction	2
a. Power	3
b. Unreasonableness and Self-Restraint	6
c. Comparison to Japanese Law	6
2. Judgments	8
a. Recognition and Enforcement	8
b. Res Judicata	10
c. Comparison to Japanese Law	11
B. U.S. Views of the Draft Hague Convention	12
II. Japanese Approach	16
A. Representative Japanese view of the Draft Hague Convention	16
B. Representative U.S. View of Japanese Law	18
III. Specific Problem: Parallel Actions	20
A. U.S. Law	20
B. Japanese Law	21
C. Reconciliation	22
IV. General Resolution: Bilateral Treaty	24
Conclusion	26

Introduction

A provocative recent book contends as follows: "In many areas of the law, Japan and the United States track each other closely. In much of civil procedure, they diverge radically."¹ Included in the litany of clashing pro-

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1. J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 150 (1999). Those authors attribute the radical differences to two sources: U.S. federalism and juries. Although it is true that U.S. federalism complicates some of the details of federal and state jurisdiction and judgments law, it does not alter the basic concepts. The basic issues are how far a sovereign can reach and what a court's judgment decides, and for these issues the federal government and the states both receive sovereign status

cedural differences are the two countries' laws on jurisdiction and judgments.

The authors contrast jurisdiction laws by comparing Japanese venue to U.S. interstate jurisdiction; for the contrast of judgments laws, they compare the contents of the two countries' *res judicata* provisions.² I, however, shall contend that when the focus expands to international jurisdiction and to recognition and enforcement of foreign judgments, the comparative picture becomes much more placid. Indeed, the picture even becomes promising for further future alignment of the two countries' procedural laws.

I. U.S. Approach

A. Basic Law

The U.S. law on jurisdiction and judgments admittedly has the reputation of being complicated, vague, and overreaching. That may be true to a certain extent. But closer examination reveals that the essence of the U.S. law is quite defensible—and should be quite understandable to the Japanese in particular.

1. Jurisdiction³

For a court properly to undertake a civil adjudication, the court must have territorial authority to adjudicate. This requirement confines the place of litigation, putting restrictions on the court's authority to entertain litigation with nonlocal elements. The basic U.S. law on the subject is this: the forum acquires adjudicatory authority in civil cases through *power* over the target of the action (be it a person or a thing), unless litigating the action there is *unreasonable* (that is, fundamentally unfair)—although the sovereign can naturally choose the *self-restraint* of exercising less than its full adjudicatory authority.

The U.S. Supreme Court has formulated these principal limitations on a court's territorial authority from the opaque few words of the Due Process Clauses of the U.S. Constitution.⁴ It has largely elaborated U.S. law on the interstate level and in fact has decided only a very few international cases.⁵ The United States has no treaties on international jurisdiction.

under the U.S. constitutional scheme. Thus, their answers resemble those that a foreign sovereign, such as Japan, would reach.

2. See *id.* at 137-39, 144-45.

3. See generally KEVIN M. CLERMONT, *CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE* (1999).

4. As the Supreme Court finally made clear in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), due process dictates both that the forum state must have *power* over the target of the action *and* that litigating the action there must be *reasonable*. And the Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), further clarified that while the plaintiff has the burden of persuasion as to power, it is up to the defendant to show unreasonableness.

5. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), described *infra* note 10; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), described *infra* note 10; cf.

a. Power

Prompted by the tensions among states in a federation, the United States early adopted a theory of exclusive power based on territoriality: each sovereign had jurisdiction, exclusive of all other sovereigns' jurisdiction, to bind persons and things present within its territorial boundaries.

This old requirement of power remains very much a part of U.S. law today. However, the scope of power has expanded beyond the basis of physical presence. The common element in specifying the current bases of power—the defining feature of the power test—is the narrow focus on whether the relation of the target of the action to the sovereign constitutes “minimum contacts,” as opposed to a broader inquiry that would take account of the plaintiff's and the public's interests.

This image of power inevitably raised the question of power over what or whom, despite the undeniable fact that all actions really affected the interests of people. That is, to measure the strength of the power relation between the sovereign and the target of the action, the law had to specify the target of the action. Thus, the American categorization of territorial jurisdiction arose into jurisdiction over things and persons. That is, the basic categories of jurisdiction are nonpersonal and personal jurisdiction.

Nonpersonal jurisdiction, or jurisdiction in rem or quasi in rem, usually involves an action against a thing, or res. Theoretically, and often formally, the action is against the thing. No personal liability or obligation results.⁶

Personal jurisdiction, or jurisdiction in personam, can result in a judgment imposing a personal liability or obligation upon defendant in favor of plaintiff or, more generally, diminishing the personal rights of a party in

Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97 (1987) (construing Federal Rules of Civil Procedure's implementation of international jurisdiction). In the *Asahi* case, the Supreme Court split badly on the question of power in the stream-of-commerce context, with a minority arguing that, to bestow jurisdiction, the manufacturer must have had an active purpose to serve the market in the forum state where the product was sold. That case's actual holding, however, was that regardless of power, jurisdiction in California was unreasonable because of the unusual facts: the state could not inflict on a Japanese valve manufacturer the burden of defending this indemnity claim by a Taiwanese tire-tube manufacturer, when neither the Taiwanese party nor the forum state had substantial interests in sustaining jurisdiction. Given all this ambiguous guidance, the lower courts are now shaping a new consensus that only slightly shortens the prior jurisdictional reach down the stream of commerce. Their decisions currently appear to provide that the purchaser's state has power over a seller with an actual awareness of its products being regularly sold there, and that such personal jurisdiction normally will not be unreasonable.

6. Nonpersonal jurisdiction includes the troublesome variety sometimes called attachment jurisdiction, whereby the plaintiff seeks to apply the defendant's property to the satisfaction of a claim against the defendant that is unrelated to the property. For example, New York plaintiffs might obtain jurisdiction in a New York state court for a tort claim arising from a plane crash in Turkey simply by garnishing a New York bank account belonging to the defendant, Turkish Airlines. See *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977). If successful, the plaintiff would apply the bank account to awarded court costs and then to the satisfaction of the tort claim. However, on such attachment jurisdiction, the plaintiff's recovery is limited to the bank account.

favor of another party. This is the most common kind of jurisdiction. For example, a successful tort action resting on personal jurisdiction subjects all of the defendant's nonexempt assets to execution. For another example, a suit for an injunction requires jurisdiction in personam and subjects the defendant to the court's contempt sanctions.

While nonpersonal jurisdiction still requires physical presence of the thing, personal jurisdiction can now rest on thinner connections. The relationships between the defendant and the forum sufficing to establish power fall into several basic types. These are the primary *bases* of power for personal jurisdiction. (Of course, to survive due process scrutiny, any exercise of jurisdiction must not fail the more free-form test of unreasonableness. Nevertheless, because of the predominant role of the power test, cataloguing the primary bases of power is in fact an expressive means for mapping the bounds on personal jurisdiction.)

Some of these bases of power rest on strong contacts between the defendant and the forum, giving power to adjudicate any personal claim whether or not related to those contacts. Thus, one says these bases support *general jurisdiction*. They each workably provide a predictably certain forum, which usually is a fair one.

The ancient basis of presence gives power to adjudicate any personal claim if the defendant is served with process within the sovereign's territorial limits. Thus, even momentary presence of the defendant creates power—so-called transient jurisdiction—to adjudicate a claim totally unrelated to that presence.⁷

The basis of domicile gives power to adjudicate any personal claim if the defendant is domiciled, or incorporated, in the territory when served anywhere with process. "The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."⁸

Other of these bases of power rest on lesser contacts between the defendant and the forum, giving power to adjudicate only those personal claims related to the contacts. Thus, these bases support *specific jurisdiction*. They provide useful and indeed necessary jurisdiction, but can generate some very difficult problems of line-drawing.

An individual or corporate defendant may actually consent to personal jurisdiction, thereby creating a basis of power defined by the terms of the consent. The possibility of the defendant's limiting the consent justifies classifying the consent basis under the heading of specific jurisdiction. The defendant may express consent in a number of ways. The defendant may consent before suit is brought, as in the common provision in business contracts consenting to a particular state's jurisdiction, or as pursuant to the common statutory requirement that anyone seeking a license to do business in a state must appoint a local agent to accept service of process.

7. See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (noting valid service on defendant flying over the state).

8. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Alternatively, the defendant may consent after suit is brought, by accepting or waiving service of process, or by choosing not to object to personal jurisdiction.⁹

A relatively new and very vibrant basis of power gives the state power over an individual or corporation that has committed certain state-directed acts, but the power extends only to those personal claims arising out of those acts.¹⁰ Important examples include the following: tortious acts; business activity; property ownership, use, or possession; and litigating acts. These examples should not give the idea that anything goes. The Supreme Court has sometimes found the defendant's activity too slight to bestow power on the state.¹¹ Drawing the line is difficult. However phrased, the test, in application, turns on a close inspection of the facts and circumstances peculiar to the case. The issue of minimum contacts "is one in which few answers will be written in 'black and white. The grays are dominant, and even among them the shades are innumerable.'" ¹²

Speaking more generally, the critical defect in the U.S. law of jurisdiction is the persistence of the power test. The difficulties with this test are numerous. Most prominently, the power test remains undefinable, and hence difficult to apply. It never produced exclusive jurisdiction. One state's jurisdiction more evidently came to overlap other states' jurisdiction, as the power test became increasingly metaphorical. Instead of looking only to physical presence, courts looked to the in-state effects of the defendant's acts or even to the quality and nature of the acts. Ultimately, the Supreme Court has come to require "a sufficient connection between the defendant and the forum [s]tate to make it fair to require defense of the action in the forum."¹³ Whether it is "fair" to exercise power over the

9. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964).

10. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317-19 (1945). However, as the level of the defendant's state-directed activity increases, the state's power extends to claims less related to that activity. Both the level of activity and the degree of unrelatedness are continual. If state-directed activities are considerable, they bestow power even though they might be called partial, parallel, or incidental to the activities that the claim actually "arose from," because those state-directed activities sufficiently "relate to" the claim. Indeed, if a defendant's business activities in the forum state when served with process are extensively continuous and systematic—which is phrased as "doing business" rather than merely "transacting business"—the defendant becomes subject to jurisdiction even on claims wholly unrelated to the in-state activities. In this way, the development of the state-directed acts basis has brought into the open the absence of any clear distinction between specific and general jurisdiction. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (upholding jurisdiction in an Ohio state court suit against a Philippine corporation, which was performing all of its management activities in Ohio while mining was suspended by the effects of war in the Philippines, on a basically unrelated claim); cf. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (finding no general jurisdiction of Texas over a foreign corporation, but not reaching the difficult issue of more specific jurisdiction).

11. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (finding jurisdiction unconstitutional when, after a New York couple divorced and the wife and two children moved to California, the wife brought a California state court suit seeking child support, serving process on the husband in New York).

12. *Id.* at 92 (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

13. *Id.* at 91.

defendant must turn on the interests of others, and so the power test is inevitably eroding into a reasonableness test. Currently, the power test remains a complicated way station on the road to a better law of jurisdiction.

b. Unreasonableness and Self-Restraint

Another result of the judicial elaboration of due process has been the overlaying of an unreasonableness test onto the power test. The new test of unreasonableness balances the opposing parties' interests, along with the public's interests in the litigation. It also takes into account a diverse and complete set of relevant considerations, such as the actualities of the choice-of-law process. Although rather uncertain in application, this party-neutral and all-things-considered test directly measures jurisdiction by the pertinent standard of "fair play and substantial justice," that is, the minimal floor of fundamental fairness in the broadest sense. The chosen forum need not be the ideal forum, but the forum, even if it has power, must not be an unreasonable one in light of all these interests in the litigation.¹⁴

The state and federal sovereigns have in fact chosen to exercise less than their full adjudicatory authority under the Constitution. These choices find expression in a variety of statutes and doctrines. Most prominent among them is the law of venue. Venue, at least as traditionally defined, does not exhaust the subconstitutional restrictions on geographic selection of forum. For example, *forum non conveniens* is a doctrine of self-limitation, whereby a court may exercise its discretion and decline existing territorial authority to adjudicate if the court is a seriously inappropriate forum and if a substantially more appropriate forum is available to the plaintiff. Indeed, the sovereigns have developed a variety of statutes and doctrines that decline, albeit usually in minor ways, constitutionally permissible territorial authority to adjudicate with respect to certain non-local cases. For another example, a state's statute might close its courthouse doors to any action between nonresidents on a claim arising outside the state. Therefore, all of these self-imposed limitations form part of the law of territorial authority to adjudicate, properly conceived.

Unreasonableness and self-restraint are similar in theory. The former embodies the most basic aspects of fairness, and so the courts have forced it on the law by means of constitutional interpretation. The latter restraints are those that the federal and state governments have additionally chosen to adopt as restrictions on themselves.

c. Comparison to Japanese Law

What should strike a Japanese audience is how familiar a lot of this sounds, if only the U.S. jurisdictional law were limited to personal jurisdiction, and then stripped of much of its history and some of its details.

14. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), described *supra* note 5.

Take this description of the essence of Japanese jurisdictional law: First, the courts have developed the law from general principles, rather than from statutory provisions or from treaties; second, the important starting point is the extension of domestic venue law to the international jurisdictional setting; and third, with an emphasis on the relation of the defendant to the court and by rare consideration of the special circumstances of the individual case, the courts ensure that the principle of justice ultimately prevails in Japan's somewhat complicated and vague jurisdictional law.¹⁵ This general description applies equally to U.S. jurisdictional law.

Of course, the Japanese law did evolve from the civil law, so in its details it exhibits a heavier emphasis on fairness, and hence on general jurisdiction at the defendant's domicile.¹⁶ Japan, however, has made additional provision for specific jurisdiction in actions of tort, contract, and property.¹⁷ Note also that Japan has its exorbitant jurisdiction, having inherited Germany's personal jurisdiction based on the attachment of assets.¹⁸

More recently, the Japanese law on jurisdiction has adopted some aspects of the U.S. approach,¹⁹ while the United States has increasingly emphasized fairness. These developments demonstrate how different legal systems tend toward convergence, given similar socio-economic influences. When all is said and done, the Japanese law of today is not so different from the U.S. law of international jurisdiction, at least if one ignores the exorbitant bases of jurisdiction on both sides.

15. See Masato Dogauchi, *Jurisdiction over Foreign Patent Infringement from a Japanese Perspective in Consideration of the Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters as of June 2001*, 44 JAP. ANN. INT'L L. 35 (2001). Compare *Family Co. v. Miyahara*, 51 MINSHU 4055 (Sup. Ct., Nov. 11, 1997), 41 JAP. ANN. INT'L L. 117 (1998) (special circumstances qualification), with *Goto v. Malaysian Airline Syst Berhad*, 35 MINSHU 1224 (Sup. Ct., Oct. 16, 1981), 26 JAP. ANN. INT'L L. 122 (1983) (basic jurisdictional approach). See generally TAKAAKI HATTORI & DAN FENNO HENDERSON, *CIVIL PROCEDURE IN JAPAN* § 4.07 (Yasuhei Taniguchi, Pauline C. Reich & Hiroto Miyake eds., 2d ed. 2002); HIROSHI ODA, *JAPANESE LAW* 447-48 (2d ed. 1999); YASUNOBU SATO, *COMMERCIAL DISPUTE PROCESSING AND JAPAN* 179-81 (2001); John O. Haley, *The Adjudicatory Jurisdiction of Japanese Courts in Transnational Litigation*, in *LAW AND JUSTICE IN A MULTISTATE WORLD* 705 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002); Masatami Otsuka, Japan, in 2 *TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE* JAP-1, JAP-8 to -12 (Richard H. Kreindler gen. ed., 1997).

16. See TAKAAKI HATTORI & DAN FENNO HENDERSON, *supra* note 15, § 4.05(2)-(3).

17. See *id.* § 4.05(4).

18. See MINOSHU [CODE OF CIVIL PROCEDURE], art. 5(iv), available in part at <http://www.japanlaw.co.jp/procedure/civilcode.html> [hereinafter CCP]; TAKAAKI HATTORI & DAN FENNO HENDERSON, *supra* note 15, § 4.05[4][d]; ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 251 (2d ed. 2002).

19. See Dogauchi, *supra* note 15, at 6-7 (discussing Japan's stress on court-defendant nexus, as opposed to the civil law's usual stress on court-claim nexus).

2. Judgments²⁰

Within one sovereign's boundaries, the sovereign can do pretty much as it wishes. Its courts can reach as far as it pleases, and it then can enforce the resulting judgment on the defendant if present or on any of the defendant's assets present. In this sense, the sovereign's power is limitless. Of course, the sovereign can choose to respect its own limits, whether imposed by constitution or by self-restraint.

Outside the sovereign's boundaries, a sovereign's reach is limited. The acts of a foreign government have no effect within another government's territory, unless the latter government chooses to give them effect. The second sovereign's court may choose not to respect the first sovereign's judgment that is the product of overreaching. The task here, then, is to specify what treatment a judgment will receive in a subsequent civil action in another judicial system, and so to reveal these indirect restrictions on U.S. jurisdiction.

a. Recognition and Enforcement

A court will *recognize*, or in other words give effect under the doctrine of *res judicata*, to a nondomestic judgment that is valid and final. In the U.S. view, when the second court faces the question of whether the prior judgment is valid and final, it normally should apply the law of the judgment rendering sovereign; when the second court faces a question of *res judicata* based on the prior judgment, it normally should apply the law that the rendering court would apply. The basic approach to judgments thus is retroverse, in the sense of turning backward to look at the rendering court's view of its own judgment: the second court lets the first court's law decide what it conclusively adjudicated.²¹

Furthermore, the second court will *enforce* a judgment entitled to recognition. However, with respect to the method of enforcement, the second court applies its own law, subject to the proviso that the method should not be so complex or expensive as to burden unduly the enforcement of nondomestic judgments. A usual method of enforcement is for the plaintiff to initiate in the second jurisdiction an action upon the prior judgment and thus obtain a regularly enforceable domestic judgment.

The common issue tying into the above discussion of jurisdiction is validity. The second court will respect only valid judgments. To be valid, speaking generally of the U.S. view, the judgment rendering court must have had territorial jurisdiction, as well as subject matter jurisdiction and given adequate notice. The second court should not search for mere error, such as violations of venue and other self-restraint provisions or even errors of substantive law. It will, however, examine territorial jurisdiction.

20. See generally ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* (2001).

21. See ALI INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT 37-44 (Discussion Draft 2002); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 54-55 (1984).

It will deny effect to judgments that reflect jurisdictional overreach. Thus, to some degree, the second court can restrict the effective territorial reach of the rendering court. Accordingly, these restrictions are sometimes called the law of indirect jurisdiction.

The above-described principles are obligatory on U.S. courts when the judgment comes from another U.S. court. The obligation derives largely from the Full Faith and Credit Clause of the U.S. Constitution. But U.S. courts treat judgments of foreign nations much like U.S. judgments. Their respect flows from comity rather than from constitutional obligation. U.S. courts give respect to foreign judgments not only because finality is a fair and efficient policy, but also because U.S. courts hope to encourage similar respect for their own judgments abroad. Thus, if the foreign sovereign that rendered the judgment had subject matter and territorial jurisdiction and if the circumstances of the adjudication were such that the parties can be said to have had a fair day in court, the foreign *res judicata* law should be applicable and the foreign judgment should be enforceable in the United States.

The United States in fact behaves fairly generously in this regard, compared to most other nations. Nevertheless, a closer look at the actual holdings suggests that U.S. courts apply slightly different standards to judgments of foreign nations, as compared to those applied to U.S. judgments. The principal reason for the difference is that a U.S. court has no guarantee that a foreign judgment, although comporting with the basic requirements of the foreign nation, is minimally acceptable to Americans. The foreign laws concerning validity vary widely. Moreover, the Due Process Clause does not control foreign sovereigns, of course, and so the workings of the foreign legal system could be rather, well, foreign. From this insight follow four corollaries. First, a U.S. court will give no respect to a foreign judgment that it views as repugnant. Thus, a U.S. court will not recognize or enforce a foreign judgment resulting from proceedings that failed to meet the basic notions of U.S. due process, including adequate notice. Second, while a U.S. court can ask whether jurisdiction existed under the foreign law, the U.S. court more importantly may examine whether the foreign assertion of jurisdiction satisfied the American tests of due process. For example, a U.S. court would disregard a French judgment for which personal jurisdiction was based solely on the plaintiff's French domicile. Third, a U.S. court might apply other limitations on comity, such as refusing recognition or enforcement if the original claim is directly contrary to strong local public policy. For a procedural example of those limitations, a foreign default judgment rendered contrary to a forum selection clause's derogation might fall within the public policy exception. Fourth, in principle but not in general practice, a U.S. court might require reciprocity.²²

22. See *Hilton v. Guyot*, 159 U.S. 113-14 (1895) (imposing reciprocity on federal law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f (1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (1987); cf. J. Noelle Hicks, *Facilitating International Trade: The U.S. Needs Federal Legisla-*

International law itself plays no real role in U.S. treatment of foreign judgments, except to the extent that the U.S. approach is already a manifestation of any generally recognized principles that constitute part of international law. The United States does not have a single treaty on the subject.

b. Res Judicata

Parties can invoke res judicata only outside the initial action, that is, outside the first-instance process and any direct review such as appeal. So, the usual discussion of res judicata contemplates the context of two actions, presuming a first action (Action #1) that led to judgment and then addressing that judgment's effect on a pending second action (Action #2), which may have begun before or after Action #1. For example, the plaintiff in Action #2 might invoke res judicata to preclude the defendant from defending on the underlying merits in an action upon a judgment rendered in Action #1, or in some other action the plaintiff might invoke res judicata to foreclose relitigation of certain issues decided in Action #1. Similarly, the defendant in some subsequent action might invoke res judicata as a defense by using a prior judgment to defeat a claim or preclude an issue.

So imagine an Action #1 for damages resulting in a valid and final personal judgment, and then an Action #2 between the same parties. What follows is the general scheme.²³

As to *claim preclusion*, if the plaintiff prevailed in Action #1, generally his claim is extinguished by, or merged in, the judgment. He cannot maintain Action #2 on the same claim in an effort to win a more favorable judgment. Similarly, if the plaintiff instead lost Action #1, generally his claim is extinguished, or barred, by the judgment. If he brings Action #2 to try again, the defendant may plead res judicata and thereby stop him in his tracks. Thus, outside the context of the initial action, a party (or his privy) may not relitigate a claim decided therein by a valid and final judgment, subject to certain exceptions, of course. The claim is defined transactionally, so as to include all rights arising out of the set of connected facts; the judgment extinguishes the whole claim, precluding all matters within the claim that were or could have been litigated in that initial action.

This doctrine of claim preclusion subdivides into *merger* and *bar*. On the one hand, if the judgment in the initial action was in the *plaintiff's favor*, the plaintiff's claim is said to merge in the judgment. The plaintiff cannot bring a second action on the claim in the hope of winning a more favorable judgment. However, the plaintiff can seek to enforce the judgment, and the defendant cannot then raise defenses that were or could have been interposed in that initial action. On the other hand, if the judgment in the initial action was in the *defendant's favor*, the plaintiff's claim is said

tion Governing the Enforcement of Foreign Judgments, 28 BROOK. J. INT'L L. 155, 176-78 (2002) (arguing for legislation that would impose reciprocity in all circumstances).

23. See RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982); Robert G. Bone, The American Law of Preclusion: Legal Doctrine Under Policy Pressure (forthcoming in Japanese) (English manuscript on file with author).

to be barred by the judgment. The plaintiff cannot bring a second action on the claim in the hope of winning this time.

Next, *issue preclusion* appears where exceptions to claim preclusion exist. What happens if, by virtue of an exception, the plaintiff can maintain Action #2 on the same claim? Or what happens in the more likely situation where the plaintiff and the defendant are involved in an Action #2 on a different claim, but a claim that involves some issues common to Action #1? These situations present the question of the effect in Action #2 of decisions on issues in Action #1. Generally, any such decision is conclusive on the same issue in Action #2 if it was actually litigated and determined in Action #1 and if its determination was essential to the judgment in Action #1. For example, if the judge in Action #1 found the plaintiff negligent in causing an accident, the former defendant could use that finding against him to preclude the issue's relitigation in Action #2, which was brought by the former defendant for her own injuries in the accident. Thus, outside the context of the initial action, regardless of which party won judgment, a party (or his privy) may not relitigate any issue of fact or law actually litigated and determined therein if the determination was essential to a valid and final judgment, subject to many exceptions, of course. Unlike claim preclusion, which reaches even matters that could have been but were not litigated, issue preclusion reaches only matters that were actually litigated and determined. And issue preclusion reaches only essential determinations, not dicta or other asides.

This doctrine of issue preclusion subdivides into *direct estoppel* and *collateral estoppel*. On the one hand, if the second action is on the *same claim* as the initial action (the second action presumably falling within some exception to claim preclusion), then the applicable variety of issue preclusion is direct estoppel. On the other hand, if the second action is on a *different claim* (which is much more common), then the applicable variety of issue preclusion is collateral estoppel.

Now relax the assumption that the two actions involve the same parties. A stranger to a prior judgment cannot be bound by it. However, the stranger can benefit from it. The most important example of such benefit is a stranger using a prior judgment for collateral estoppel against a former party.

c. Comparison to Japanese Law

Again, some of this should sound familiar to Japanese ears. In Japan, the Code of Civil Procedure (the "Code") provides for recognition and enforcement of valid and final foreign judgments, provided that there was jurisdiction and adequate notice, and provided that respecting the judgment is not contrary to public policy or to reciprocity.²⁴ The same description applies broadly to U.S. judgments law.²⁵ It is noteworthy, however,

24. See CCP, *supra* note 18, art. 118; Minji shikko-ho [Civil execution law], Law No. 4 of 1979, art. 24; JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 345-52 (1996).

25. Again, of course, as one descends toward details, the differences increase. See *Sadhwani v. Sadhwani*, 52 MINSHU 853 (Sup. Ct., Apr. 28, 1998), *translated in* 42 JAP.

that Japan treats punitive damages as contrary to public policy.²⁶

Contrariwise, the U.S. law of *res judicata* is much broader than that of Japan. The Japanese law comprises a narrow form of claim preclusion applicable only to claims actually asserted and contains no true issue preclusion.²⁷ Accordingly, Japan would tend to apply its own *res judicata* law to foreign judgments.²⁸ That is, although the United States applies Japanese *res judicata* law to Japanese judgments, Japan would apply Japanese *res judicata* law to U.S. judgments. Instead of seeing a difference here, one could argue that both countries adhere to the reasonable principle of applying the less extensive *res judicata* law to foreign judgments.

B. U.S. Views of the Draft Hague Convention²⁹

To understand the U.S. position, one must first look to European developments. The principal European countries now appear ahead of the United States on the treatment of foreign judgments. The European Union has an enlightened, albeit far from perfect, treaty dating from 1968. That treaty is the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which morphed into a Euro-

ANN. INT'L L. 155 (1999) (requiring foreign judgments also to satisfy Japanese jurisdiction law); Takonobu Takehara, *Japan*, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLD-WIDE 54, 58-59 (Charles Platto & William G. Horton eds., 2d ed. 1993) (saying that the Japanese view of finality applies as well, including the requirement that the time to appeal has expired). See generally ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 142 (Ronald A. Brand ed., 1992); Samuel Jarman, *Japan*, in ENFORCEMENT OF FOREIGN JUDGMENTS 263 (Dennis Campbell ed., 1997); Takao Sawaki, *Recognition and Enforcement of Foreign Judgments in Japan*, 23 INT'L LAW. 29 (1989); Morio Takeshita, *The Recognition of Foreign Judgments by the Japanese Courts*, 39 JAP. ANN. INT'L L. 55 (1996); Masayuki Yoshida & Nobuyuki Taji, *Japan*, in ENFORCEMENT OF FOREIGN JUDGMENTS Japan-1 (Louis Garb & Julian Lew eds., 2001).

26. See *Northcon I v. Mansei Kogyo Co.*, 51 MINSHU 2573 (Sup. Ct., July 11, 1997), translated in 41 JAP. ANN. INT'L L. 104 (1998); Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285 (1999); see also Takeshita, *supra* note 25, at 67-69; cf. *id.* at 74 ("Noticeably, most non-recognition cases are concerned with judgments emanating from the United States. This seems to reflect the differences in thinking between the two countries with regard to matters such as jurisdictional basis, service abroad, damages, and custody.").

27. See CCP, *supra* note 18, arts. 114-15; Casad, *supra* note 21, at 66-67; cf. RAMSEYER & NAKAZATO, *supra* note 1, at 144-45 (attributing the narrowness of Japanese preclusion law to the low cost of proving anew in a system that relies on documentary evidence and operates without juries).

28. See HATTORI & HENDERSON, *supra* note 15, § 14.03(1)(a) (predicting, in the absence of precedent, this narrow construction of CCP, *supra* note 18, art. 118). It is worth noting that some countries, such as Germany, talk of applying the rendering sovereign's more expansive *res judicata* law, but it seems doubtful that they would actually do so when it made a real difference. See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1681 n.275 (1968).

29. See generally Kevin M. Clermont, *An Introduction to the Hague Convention*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 3 (John J. Barceló III & Kevin M. Clermont eds., 2002).

pean Union Regulation on March 1, 2002.³⁰

By the Brussels Convention, the member states agreed to provide virtually automatic recognition and enforcement of the judgments of the other member states. This provision was like the Full Faith and Credit Clause of the U.S. Constitution. In order to make this judgments agreement acceptable, the Brussels Convention was a "double convention" that also defined the bases of jurisdiction—the doctrine that must, in any judgment respecting regime, serve almost alone in ensuring adjudicative restraint. The European member states could give respect to the others' judgments because they knew that the Brussels Convention restricted the others to appropriate jurisdictional reach. This latter restriction worked as the Due Process Clause does in the United States.

Today, the EU Regulation's jurisdictional bases follow the civil law approach. The defendant's domicile is the usual place for suit, although there is additionally long-arm-like jurisdiction for tort and contract actions. Certain disadvantaged plaintiffs, such as consumers, can often sue at home. Moreover, there is authorization for forum selection agreements, and there is exclusive local jurisdiction in actions concerning real property and the like.

Further on the prohibited side, each member state gave up its exorbitant jurisdiction. France, for example, gave up its personal jurisdiction based on the plaintiff's French nationality. Similarly, England gave up transient jurisdiction and attachment jurisdiction. Additionally, the Brussels Regulation not only prohibits exorbitant jurisdiction, but also makes mandatory the permissible bases of jurisdiction. So, England abandoned its judicial practice of sometimes declining jurisdiction on expressly discretionary grounds.

Europe does not appear superior in all regards, however. Note that the Brussels Regulation applies only to defendants domiciled in a member state. Indeed, the Brussels Regulation openly discriminates against outsiders. Accordingly, although France cannot use its exorbitant jurisdiction in a suit by a French domiciliary against an English person, it can still use it when the defendant is an American. Moreover, the resulting French judgment gets recognition and enforcement in England, Germany, and elsewhere in the European Union against the American or the American's assets there. Admittedly, this example is extreme, without much importance in actual practice, but illustrates the theoretical context.

Similarly, the virtually automatic recognition and enforcement under the Brussels Regulation does not extend to judgments rendered by countries that are not member states. The European countries, in fact, have traditionally been and continue to be rather stingy in extending respect to foreign judgments not covered by treaty, such as U.S. judgments.

In short, Americans are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of

30. No. 44/2001, 2001 O.J. (L 12) 1. There is also the related Lugano Convention, which extended the Brussels Convention to the EFTA countries.

European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.

The overall international situation, as exacerbated by the Brussels Regulation, is untenable in the long run for the United States. Therefore, in 1992, the United States initiated a push to conclude a worldwide convention on jurisdiction and judgments, having naturally chosen to work through the Hague Conference on Private International Law. A convention would resolve the whipsawing predicament in which Americans today find themselves regarding exercise of jurisdiction, as well as recognition and enforcement of judgments.

Drafting and agreeing on a multilateral convention thus could yield great returns for the United States on both jurisdiction law and judgments law. A convention would rationalize the law on an international level. In the specific matter of treatment of foreign judgments, a convention would unarguably be desirable for the United States. It would mean that the United States could get returns for the respect it already accords other nations' judgments. As to the jurisdictional side, a convention would cause other nations to renounce their own exorbitant jurisdiction. It could also substantively improve U.S. jurisdiction law in international cases.

Will such a convention come into existence, as opposed to a narrow convention treating special problem areas such as exclusive choice-of-court agreements in business-to-business contracts?³¹ As negotiations enter their final phase, the possibility still persists that a multilateral convention of general scope will emerge for signature, ratification, and implementation. But the possibility now appears slim. And the United States has little bargaining power. It needs a convention, while the Europeans have little to gain over their presently favorable situation. The Europeans have exhibited some fixed positions and bloc voting. The negotiations have indeed often degenerated into disputes between Americans and Europeans, leaving other countries' delegates on the sidelines.

31. For the latest suggestion of the content of an eventual convention, see the Hague Conference on Private International Law's website, available at <http://www.hcch.net/e/workprog/jdgm.html>. For a balanced evaluation of the current stalemate, see Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead*, 4 EUR. J.L. REFORM 219 (2002). One key to understanding the draft Hague Convention is the notion of a "mixed convention," as distinguished from a double convention. The United States has pushed a mixed convention from the beginning as a way to bridge the negotiators' wide differences on jurisdictional approaches. This mixed convention includes not only a so-called whitelist of required jurisdictional bases and a so-called blacklist of prohibited bases, like a double convention, but also a catch-all gray zone of permitted bases. In the gray zone, a signatory country could exercise jurisdiction on any basis under its own law not on the blacklist or whitelist, but other countries would not have to recognize or enforce the resulting judgment. Although such a mixed convention does not go as far in providing global uniformity as a double convention, its more limited ambition greatly facilitates international agreement. It also provides a means to handle jurisdiction in areas where diversity of practice is beneficial at present or where significant changes are foreseeable in the near future.

Because of this imbalance of power, the expectation is that any eventual convention of general scope would be very similar to the EU Regulation. This eventuality means that the United States would abandon—on the international level, but not necessarily with respect to its courts' actions against its own habitual residents—attachment jurisdiction,³² transient jurisdiction,³³ doing business as a basis for general jurisdiction,³⁴ and much of *forum non conveniens*. The Europeans' objection is to the U.S. proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's property ownership, physical presence, or doing business in the forum. They do not object to specific jurisdiction, as long as a rules-based approach controls its mandatory application. Thus, jurisdiction under a Hague Convention would exist at the unconsenting defendant's habitual residence or where a specific part of the events in suit occurred, but would not extend to the broader bases of jurisdiction now authorized by U.S. law. In sum, the Hague Convention would agree on certain bases of territorial jurisdiction, but chiefly those palatable to the Europeans—and judgments based thereon would receive virtually automatic recognition and enforcement in other signatory countries (except those judgments that the Europeans consider too generous or punitive).

Such a prospect is not to the United States' liking.³⁵ In the end, perhaps the United States would have to pay too great a price for securing agreement to a Hague Convention. Or perhaps the document emerging from the intermittent and contentious drafting sessions would be too imperfect. Some of its current provisions remain maddeningly awkward or vague. Until recently, generalist drafters had not treated technical matters, such as intellectual property very well. Also, their lack of foresight has thus far prevented the crafting of handles on future developments, such as e-commerce.

Reaching agreement on a Hague Convention is therefore far from a certainty. The only thing certain is that the final segment of the path to international agreement will not be smooth. Regardless of the ultimate outcome, however, the fruits of negotiation have definitely been worth the effort. Merely negotiating the draft Hague Convention has taught all sides a lot about jurisdiction and judgments. In particular, it has given the United States the opportunity to untangle its law in domestic cases on its own.³⁶

32. See *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977).

33. See *supra* text accompanying note 7.

34. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

35. See Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE*, *supra* note 29, at 281; Letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private Int'l Law, U.S. Dep't of State, to J.H.A. van Loon, Secretary General, Hague Conf. on Private Int'l Law (Feb. 22, 2000) (on file with author).

36. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999); Kevin M. Clermont & Kuo-Chang Huang, *Converting the Draft Hague*

II. Japanese Approach

A. Representative Japanese View of the Draft Hague Convention

I take as representative, albeit at times lonely, the written views of Professor Masato Dogauchi of the University of Tokyo, who is an official delegate to the Hague Conference.³⁷ His bottom line on the draft Hague Convention is very positive. He views globalization and interdependence as creating the need for a convention and finds that the draft would make for a "more predictable and more stable legal order on the earth."³⁸ Indeed, he reports that "the Japanese government seems very positive towards the Hague Project."³⁹

Professor Dogauchi observes that Japan is well-positioned between civil law and common law countries on the subject of jurisdiction, so that it can accommodate the demands of both. This flexible posture means, among other things, that Japan has supported the United States' idea of a mixed convention all along.⁴⁰

Of course, Professor Dogauchi has some concerns about the draft Convention. He makes some good points about the scope of its coverage and the requirements for service of process. But his leading concerns are jurisdictional.

Among others, in the United States, [although] a trend to limit its scope of jurisdiction can be noticed, there are still huge risks for Japanese parties to be summoned in the United States courts to defend [claims unrelated to] their activities in the country (doing business as the basis for general jurisdiction). The service of a writ upon the defendant is also a potential risk for the Japanese parties who attend conferences or meetings in the United States.⁴¹

He is absolutely correct here. The United States should give up its exorbitant jurisdiction in exchange for Japan doing the same.

Article 18 of the draft Convention would eliminate transient jurisdiction as a basis of general jurisdiction. This basis has long enjoyed judicial approval in the United States and thus is constitutional, provided its application is not so outlandish that it is unreasonable in the particular circum-

Treaty into Domestic Jurisdictional Law, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE, *supra* note 29, at 191.

37. Dogauchi, *supra* note 15.

38. *Id.* at 16.

39. *Id.*

40. See *Comments by the Japanese Government on Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Prelim. Doc. No. 14, at 3-4 (Apr. 2001), available at ftp://ftp.hcch.net/doc/jdgm_pd14jp.doc; Masato Dogauchi, *Jurisdiction over Foreign Patent Infringement from a Japanese Perspective in Consideration of the Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters as of June 2001*, 44 JAP. ANN. INT'L L. 35, 39-41 (2001); *supra* note 31 (defining mixed convention).

41. Dogauchi, *supra* note 15, at 11; see Dogauchi, *supra* note 40, at 42 n.20 (saying that doing-business jurisdiction is considered exorbitant everywhere but in the United States and that elimination of that jurisdiction is a key to the success of the Hague Convention).

stances.⁴² However, it has also long been the recipient of criticism, from academics and foreigners alike.⁴³ Formerly the most important basis of U.S. jurisdiction, it is today far from essential. It is occasionally used to sue foreigners in the United States, even though the resulting judgment would be unlikely to receive recognition or enforcement abroad.⁴⁴ Indeed, courts use transient jurisdiction, albeit inappropriately, only when all appropriate bases of jurisdiction are unavailing. Given transient jurisdiction's dubious propriety and general lack of necessity, the United States should accept the draft Convention's prohibition, and it appears willing to do so.⁴⁵

Much more controversial is Article 18's elimination of doing business as a basis of general jurisdiction, other than at an organization's principal place of business activity. Under the doing-business doctrine, if at the time of service of process the defendant's business activities in the forum state are extensively continuous and systematic, then the defendant becomes subject to jurisdiction even on claims that are wholly unrelated to the in-state activities.⁴⁶ For reasons difficult to fathom, some objective persons in the United States maintain allegiance to this doctrine.⁴⁷ However, general

42. See *Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. Ct. App. 1991) (implicitly rejecting the minority opinion of Justice Scalia in *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990), which suggested that transient jurisdiction merely by its historical pedigree always satisfies the unreasonableness test); LAWRENCE W. NEWMAN & MICHAEL BURROWS, *THE PRACTICE OF INTERNATIONAL LITIGATION* 1-115 to -121 (2d ed. 1998); *supra* text accompanying note 7 (defining transient jurisdiction).

43. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 121-23 (3d ed. 1996); MATHIAS REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE* 78 (1995) (explaining that most Western European countries do not utilize transient jurisdiction); Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 13-14, 18 (1998); Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 599-601; Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 613-16 (1991); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1296-97 (1998) (explaining that transient jurisdiction conflicts with international standards).

44. See DAVID EPSTEIN, JEFFREY L. SNYDER & CHARLES S. BALDWIN, IV, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY* § 6.04[3] (3d ed. 2002); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* § 1-6, at 50-52 (1996).

45. See Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 189-90 (1998); Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1278-79 (1998).

46. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (allowing Mississippi to exercise general jurisdiction over a Delaware corporation with its principal place of business in Illinois, for a Pennsylvania accident); *supra* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (discussing doing-business jurisdiction).

47. See ALI *INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT* 13-15 (Report 2000) (describing this dispute as a possible deal breaker); Linda J. Silberman, *Can the Hague Judgments Project Be Saved?: A Perspective from the United States*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE*, *supra* note 29, at 159, 175-79 (suggesting a compromise); cf. Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (suggesting eliminating entirely this basis against foreign defendants).

jurisdiction based on doing business, which is indeed peculiar to the United States,⁴⁸ entails terrible problems of line-drawing and does not conform to the usual rationale of general jurisdiction.⁴⁹ Because it requires the defendant to be so active in the forum as to seem a native, it is seldom available under its own terms.⁵⁰ This basis of jurisdiction arose to provide appropriate jurisdiction when specific jurisdiction was not yet fully available. Today, courts resort to it, albeit inappropriately, only when all appropriate bases of personal jurisdiction fail to reach the defendant.⁵¹ Given the shortcomings of the doing-business jurisdiction, the draft Convention in Article 18 properly abandons this basis of general jurisdiction. But of course, the more common activity-based jurisdiction that falls more solidly within specific jurisdiction would survive under the draft Convention.

Professor Dogauchi does not list concerns with punitive damages or *res judicata*, the two other areas of greatest difference between the U.S. and Japanese law discussed above. But he is well-advised not to worry about these, because under the draft Convention neither would present great dangers to Japanese interests. First, its Article 33 would relieve Japan of the obligation to recognize the part of a judgment for punitive damages. Second, although currently its Article 25 chooses the rendering law to govern finality of a foreign judgment,⁵² it remains marvelously obscure on the choice of law governing *res judicata*, leaving Japan free to apply its own narrow *res judicata* law.⁵³

B. Representative U.S. View of Japanese Law

Of the five major casebooks on international litigation used in the

48. See REIMANN, *supra* note 43, at 77, 82-83. But see Silberman, *supra* note 47, at 176-77 (reading *Goto v. Malaysian Airline System Berhad*, 35 MINSHU 1224 (Sup. Ct., Oct. 16, 1981), 26 JAP. ANN. INT'L L. 122 (1983), as creating doing-business jurisdiction).

49. See BORN, *supra* note 43, at 103-16.

50. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984) (holding that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions"). But see RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* 6 (3d ed. 2001) (citing questionable counterexamples).

51. E.g., *Frummer v. Hilton Hotels Int'l*, 227 N.E.2d 851, 854 (N.Y. 1967); see Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 187-89 (1998) (explaining that elimination of doing-business jurisdiction "will block suit in only a few cases in which the United States has a legitimate interest in providing a forum").

52. The Japanese Government has objected to this provision. See *Comments by the Japanese Government on Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, *supra* note 40, at 11-12.

53. Article 25(1) provides simply that a judgment on a proper basis of jurisdiction "shall be recognised or enforced." But see Peter Nygh & Fausto Pocar, *Report of the Special Commission*, Hague Conf. Prelim. Doc. No. 11, at 96 (2000) (assuming that the rendering law would govern *res judicata*: "Recognition is given to a judgment 'when it is given the same effect that it has in the state where it was rendered . . .'" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2 introductory note (1971))), available at <ftp://ftp.hcch.net/doc/jdgmpl1.doc>.

United States,⁵⁴ only one uses a Japanese case as a teaching case on jurisdiction and judgments.⁵⁵ The case is *Marubeni America Corp. v. Kabushiki Kaisha Kansai Tekk sho*.⁵⁶ However, taking into account the occasionally incensed reactions of my Japanese students and the pertinent law review commentary,⁵⁷ I do not take this case to be fully representative of Japanese law. Nevertheless, the particulars of that case merit consideration.

In 1968, Jerry Deutsch, an employee of the Boeing Company in Washington State, mangled his hand in a large mechanical press. Boeing had bought the press from West Coast Machinery Co. (a Washington corporation), which had bought it from Marubeni America (a New York subsidiary corporation), which had bought it from Marubeni Japan (a Japanese parent corporation), which had bought it from the manufacturer Kansai Iron Works (a Japanese corporation in Osaka). Deutsch sued West Coast and Marubeni America in a state court of Washington, alleging a defective press and requesting \$275,000. By service in Japan, Marubeni America impleaded Kansai, which attacked jurisdiction. The Supreme Court of Washington upheld jurisdictional power on the ground that Kansai had transacted business in Washington by building the press to Boeing's extensive specifications, by sending to Washington its engineers to test and inspect the press and to oversee repairs, and by sending replacement parts to Washington. Moreover, the court found the exercise of jurisdiction not to be unreasonable in view of Kansai's other extensive business in the United States, the burden on Marubeni America, and the location of evidence.⁵⁸ On September 17, 1974, the trial court awarded Marubeni America a judgment against Kansai for \$86,000.

Meanwhile, Kansai was not asleep in Japan. It sued Marubeni America

54. BORN, *supra* note 43; LOWENFELD, *supra* note 18; JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (2000); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION* (2002); WEINTRAUB, *supra* note 50.

55. LOWENFELD, *supra* note 18, at 176-83; *see also id.* at 277-78 (treating failure of *lis pendens* in *Miyakoshi Mach. Tools Co. v. Gould, Inc.*, 1348 HANREI JIHO 91 (Tokyo Dist. Ct., May 30, 1989)). However, WEINTRAUB, *supra* note 50, at 15-16, does briefly describe three jurisdiction cases, *Goto v. Malaysian Airline System Berhad*, 35 MINSHU 1224 (Sup. Ct., Oct. 16, 1981), 26 JAP. ANN. INT'L L. 122 (1983); *Family Co. v. Miyahara*, 51 MINSHU 4055 (Sup. Ct., Nov. 11, 1997), 41 JAP. ANN. INT'L L. 117 (1998); and *Mukoda v. Boeing Co. (Far Eastern Air Transport Case)*, 604 HANREI TAIMUZU 138 (Tokyo Dist. Ct., June 20, 1986), 31 JAP. ANN. INT'L L. 216 (1988).

56. 361 HANREI TAIMUZU 127 (Osaka Dist. Ct., Dec. 22, 1977). This case also receives a brief description in BORN, *supra* note 43, at 489, to support his conclusion: "Japanese courts apparently refuse to enforce U.S. judgments that are inconsistent with subsequently-entered Japanese judgments."

57. *See* Takao Sawaki, *Battle of Lawsuits: Lis Pendens in International Relations*, 23 JAP. ANN. INT'L L. 17, 28 & n.25 (1979-1980) (criticizing this case at length); Takeshita, *supra* note 25, at 71 & n.16 ("The judgment of the Osaka District Court seems to be strongly in favor of a Japanese judgment in the sense that a foreign judgment may be rejected even if it was finally and conclusively given before the relevant Japanese judgment. . . . Giving priority to a Japanese judgment in such a way as the Osaka District Court ruled would excessively jeopardize the international harmony of decisions. . . . In addition, that solution is inconsistent with the principle of *res judicata*.").

58. *Deutsch v. West Coast Mach. Co.*, 497 P.2d 1311 (Wash. 1972).

in the Osaka District Court to declare nonliability for indemnification.⁵⁹ Finding jurisdiction, the Japanese court followed precedent to reject the defense that this proceeding was a prohibited "double action," so construing the word "court" in the Code's prohibition to mean that the prior action had to be pending in a Japanese court.⁶⁰ Later, on October 14, 1974 (when there was still time to appeal the U.S. judgment), the court ruled that Marubeni America had no right to indemnity under Japanese contract or tort law.

Next, Marubeni America sued Kansai on its Washington judgment in that same Japanese court. In 1977, the court rejected that claim, denying recognition on the ground that the Washington judgment was inconsistent with a Japanese judgment (its own 1974 judgment) and hence was contrary to the public policy of Japan.⁶¹

In the U.S. view, the Japanese court in 1974 should probably have given *res judicata* effect to the Washington judgment, which was valid and final under Washington law. By any view, this ten-year battle of lawsuits is not a pretty picture.

III. Specific Problem: Parallel Actions

The way to beautify this picture of battling international lawsuits is through a sensible scheme of *lis pendens*.⁶² Here, too, the United States and Japan are not really that far apart in practice.⁶³

A. U.S. Law

The pendency of a lawsuit in one court is normally no impediment to bringing a related suit in a different court. Although the first suit to go to judgment should be *res judicata* in the other, the pendency of otherwise parallel proceedings is a commonplace with no ready cure.

A minor doctrine of some relevance is the affirmative defense called *other action pending*, or prior pending action.⁶⁴ It tries to stop repetitive litigation in its tracks, well before any troublesome rendition of judgment. Although this approach seems a sensible way to reduce repetitive litigation, the defense is only narrowly applicable. It will result in dismissal without prejudice if another action on the same claim between the same parties is

59. See DAVIS, *supra* note 24, at 349-50 (describing this common move "as a tactic to thwart the recognition of foreign judgments").

60. See CCP, *supra* note 18, art. 142 ("No party shall file a suit concerning a matter presently pending before a court."); TAKAAKI HATTORI & DAN FENNO HENDERSON, *supra* note 15, § 4.06[6].

61. See CCP, *supra* note 18, art. 118(iii); TAKAAKI HATTORI & DAN FENNO HENDERSON, *supra* note 15, § 14.03[1][a] & n.260.

62. Accord, Sawaki, *supra* note 57, at 20-21 (arguing for a *lis pendens* solution, to be achieved by applying the Code's double-action prohibition to any foreign litigation that would produce *res judicata* effects in Japan); see ODA, *supra* note 15, at 448-49.

63. See Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM L. & POL'Y J. 1, 42 (1995) (describing similar premises and many comparable doctrines).

64. See 1 C.J.S. ABATEMENT AND REVIVAL §§ 16-84 (1985).

pending in the same state, or in the same federal district, when the instant action was commenced and if that other action is still pending. Thus, its very limited scope of application serves powerfully to underscore that the usual approach is to allow a second court to proceed toward judgment despite earlier instituted litigation.

Besides the doctrine of other action pending, other inroads on the usual approach exist, but they too are minor. One court, usually the first to acquire jurisdiction, might enjoin proceedings in the other court. Alternatively, one court, usually the second, might stay its own hand in deference to the other court. A little more detail on these two approaches is appropriate.⁶⁵

An *antisuit injunction* by one court against proceedings in another court within the United States is generally prohibited, or at least will be discretionarily refused. On the international level, however, some U.S. courts are slightly more willing to enjoin a party subject to its personal jurisdiction from participating in specified foreign proceedings, equitably balancing interests but still weighting the balance against interference.

Under the vague doctrine called *lis pendens*, one court may stay its own proceedings in deference to the other's related proceedings, if the other related proceedings are in a more appropriate forum. This discretionary power has been judicially created as an incident to the courts' inherent power to control their own dockets. But here, too, the U.S. case law is split, as precedent either emphasizes the court's obligation to proceed with the case by narrowly limiting the court's power to stay its proceedings or gives the court considerable discretion to decide on an all-things-considered basis whether to stay its proceedings. When a court so stays itself, it exercises self-restraint with respect to its territorial authority to adjudicate. Indeed, this doctrine is very similar to *forum non conveniens*, albeit a bit more readily invoked, the differences being that this doctrine requires a pending alternative and that stayed proceedings are more easily revived if necessary than dismissed proceedings.

B. Japanese Law

Similarly, Japan has a Code prohibition of double actions that has only domestic application.⁶⁶ The treatment of the international problem of parallel actions instead still rests on the vague but limited court-made doctrine of *lis pendens*, despite some failed efforts to codify a solution in the 1996 reform of civil procedure.⁶⁷

65. See BORN, *supra* note 43, at 461-90; LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 369-72 (2d ed. 2000); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769 (1999); Edward Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 DICK. L. REV. 369, at 777-81 (1970).

66. See CCP, *supra* note 18, art. 142.

67. See DAVIS, *supra* note 24, at 472-74; SATO, *supra* note 15, at 181-82; Masato Dogauchi, *Japan*, in J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 303 (1995); Furuta, *supra* note 63, at 25-39; Hideyuki Kobayashi & Yoshimasa Furuta, *Products Liability Act and Transnational Litigation in Japan*, 34 TEX. INT'L L.J. 93, 108-13 (1999).

Sometimes, the court will dismiss the Japanese action for lack of jurisdiction when actually motivated in part by the pendency of the foreign action. Rarely, the court will expressly consider dismissal under the so-called German method, where the foreign action is expected with reasonable certainty to produce a judgment recognizable in Japan.⁶⁸

However, this doctrine of *lis pendens* goes unsupplemented by any statutory or case authority for antisuit injunctions.⁶⁹ Moreover, Japanese courts lack legal authority to openly stay their proceedings or to condition their dismissals.⁷⁰

C. Reconciliation

The draft Hague Convention confronts some of these difficulties in Article 21. In order to avoid parallel proceedings and to foster comity, its "first-seised rule" provides that the court where the action is first initiated should proceed to adjudicate the dispute, while the court where an action on the same cause is later brought should stay its proceedings. Because under the rest of the draft the courts' jurisdictional reach is shortened and so the plaintiffs' available forums are restricted, the advantage given to the first-suing plaintiff by the first-seised rule becomes acceptably modest.⁷¹

Nevertheless, further improvement is possible in the treatment of related actions.⁷² Imagine that the United States and Japan were to try to agree on a solution to the problem of battling lawsuits, and assume that they had otherwise agreed on jurisdictional rules. Here is the provision that I would suggest to them:⁷³

(a) Except as provided in subsection (b), a court of a state having jurisdiction in an action must stay the proceedings, or the related part thereof, if when the action commenced a related action was pending in another contracting state and:

68. See Dogauchi, *supra* note 67, at 310-16.

69. See *id.* at 318 (making a theoretical argument for the existence of the power to enjoin).

70. See *id.* at 310, 314.

71. For criticism of this rule's inducing a race to the courthouse, see Catherine Kes-sedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Prelim. Doc. No. 7, at 86 (1997). Of course, in the absence of this rule, there is a similarly undesirable race to judgment. See George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 602 n.58 (1990). On balance, the direction of the draft Hague Convention's rule is desirable. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE, *supra* note 29, at 117; Martine Stückelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference*, 26 BROOK. J. INT'L L. 949 (2001). But cf. Furuta, *supra* note 63, at 44-50, 54-55 (preferring for general application a markedly more flexible approach).

72. For a thoughtful extension of the subject under consideration from strictly parallel proceedings to the more general problem of merely related actions, viewed from both the common law and civil law perspectives, see Samuel P. Baumgartner, *Related Actions*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 203 (1998).

73. See Clermont & Huang, *supra* note 36, at 226-28 (drafting this suggestion for the domestic context).

- (1) the current proceedings present a claim asserted in that pending action; or
- (2) the current proceedings present a claim that would be a compulsory counterclaim in that pending action.
- (b) The second-seised court may refuse to stay, or may lift a stay, if in the first-commenced action:
 - (1) the plaintiff is seeking only a declaration of nonliability;
 - (2) the plaintiff fails to prosecute its case;
 - (3) a judgment would not be rendered within a reasonable time; or
 - (4) a judgment would not be recognized in the second-seised state.
- (c) Otherwise, a court of a state having jurisdiction in an action may stay the proceedings, or the related part thereof, if a related action is pending in another contracting state and the actions are so closely connected that it is expedient to hear and determine them together.
- (d) The court must resume or dismiss the stayed proceedings promptly after the other action terminates.
- (e) A court of a state may not issue an antisuit injunction to forbid a person from bringing a claim in the court of another contracting state on the ground that the other court is an inappropriate location for suit.

By way of brief explanation, subsection (a) would significantly change the traditional U.S. doctrine, by adopting the rule that the second-seised court normally has to stay its proceedings.⁷⁴ Two policies then compete regarding the appropriate scope of exceptions to this obligation. On the one hand, in order to prevent the second court from overly protecting its own citizens, exceptions should be narrowly defined and also the court should not be given much discretion to refuse to stay proceedings. On the other hand, it is essential to avoid dictating the inappropriate staying of proceedings. Thus, the four enumerated exceptions in subsection (b) generally follow the draft Hague Convention's approach, which strikes a balance in the middle.

The rest of the proposal gives the court discretion to stay its own proceedings, thus changing traditional Japanese doctrine.⁷⁵ It also expressly prohibits antisuit injunctions as being undesirable. Because the proposal binds courts to resolve the problems of parallel proceedings by *lis pendens*, and because agreed restraints on the courts' jurisdictional reach are assumed to exist, there would no longer be a need for permitting a court to issue an antisuit injunction. Two reasons for an antisuit injunction are the desire to avoid the burden of duplicate proceedings that could result in inconsistent judgments and the need to protect the issuing forum's jurisdiction or public policy. The former concern would be handled by a general rule requiring the second-seised court to stay its proceedings, and the latter concern would be alleviated by a reasonable distribution of jurisdiction among the states.

Naturally, in the unregulated context of international forum competition, when the foreign forum is not bound by agreed jurisdictional rules, the justification vanishes for a first-seised rule and for prohibiting antisuit

74. See *supra* note 71.

75. See Furuta, *supra* note 63, at 50-56 (suggesting statutory introduction of stays).

injunctions. So, the ordinary case law of the United States and Japan would remain in force toward the rest of the world.

IV. General Resolution: Bilateral Treaty

The current outlook for a multilateral convention of general scope is bleak, as already suggested.⁷⁶ That is a sad development. Harmonization of procedural systems is never easy, but it holds great promise in certain areas such as judicial cooperation across borders.⁷⁷ Currently at The Hague, thoughts are turning toward significantly narrowing the draft's scope, salvaging something from all the good work performed over the last decade but treating only special problem areas such as exclusive choice-of-court agreements in business-to-business contracts.

Important to remember is that the Brussels Convention emerged in a region that had a long history of experimentation with bilateral and then multilateral treaties on judgments and later on jurisdiction.⁷⁸ The United States was perhaps being unrealistic in jumping head-first into multilateral negotiations on broad and difficult issues with expectations of quick success. Perhaps the United States should instead have taken some smaller first steps before trying to run.

So the Hague negotiators may be wise in now cutting back the scope of their project. But I believe that an additional or alternative solution, once the Hague negotiators have amicably decided not to pursue a multilateral convention of general scope, would be for like-minded countries to pursue regional or bilateral treaties that utilize the lessons learned at The Hague. Regional treaties would be preferable theoretically, but bilateral treaties are so much more feasible. The Hague negotiations on jurisdiction and judgments have demonstrated how this problem that is polycentric even on the bilateral level becomes much more diffuse through multilateral discussion. Instead, two socio-economically similar countries, not too far apart legally at the beginning and determined to succeed in agreeing at the end, present the greatest promise.

In the context of bilateral negotiations, vague problems and dangers become easier to conceptualize and then to resolve or avoid. Having only one other legal system to investigate and accommodate is much easier. Moreover, the objections of domestic interest groups become less acute. The drafters for two advanced countries could more readily satisfy the concerns of the intellectual property bar and human rights activists, for two examples, whose concerns escalate when facing the range of fears generated by a worldwide convention that would encompass all sorts of societies and laws.

76. See *supra* text accompanying note 31.

77. See Kevin M. Clermont, *Foreword: Why Comparative Civil Procedure?*, in KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO THE CIVIL LAW* 1 (2003).

78. See SAMUEL PETER BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS* 55-67 (2003).

Consider a treaty between the United States and Japan. Among many legal similarities between the two, neither country, despite its felt needs for such an agreement, has any general treaty on jurisdiction and judgments. The closest the United States came was in the 1970's, when it negotiated a bilateral judgments treaty with the United Kingdom.⁷⁹ That effort ultimately failed because of British fears of the reach of U.S. jurisdiction and the size and punitive nature of U.S. judgments.⁸⁰ Today, the United Kingdom is part of the European Union, putting that traditional treaty party of the United States out of bounds. Japan then becomes the logical successor as partner.

The United States and Japan are both major players, with lots in common. Their relevant laws are very similar. As to their legal differences, Japan would obviously have the same fears of overreaching jurisdiction and huge judgments as the British had years ago, and as the Europeans have voiced more recently at The Hague. But times have changed. The Hague negotiations have produced a readily adoptable blacklist that prohibits certain jurisdictional bases,⁸¹ as well as producing a punitive-damages limitation,⁸² to assuage those fears.

Now, the United States is obviously in a balking mood, especially when it confronts a European-like bargaining position on jurisdiction and judgments. But the Japanese have acted somewhat more flexibly in the Hague negotiations.⁸³ They would like to put limits on U.S. excesses. In exchange, the United States could get more respect for its judgments than Japan has traditionally afforded.⁸⁴ Thus a deal seems doable, one that would give both the United States and Japan something valuable at reasonable cost—especially because a mixed-convention's form can put some of the more contentious or undeveloped issues aside.

With relatively small need for great compromise on other matters, as demonstrated in the above exercise concerning parallel proceedings, Japan and the United States could convert the draft Hague Convention into a bilateral treaty much to the taste and advantage of both countries. This treaty between two major and interconnected countries would have many direct benefits, including smoothing their relationship, imposing restraint and certainty on their mutual laws, and providing to their citizens justice without regard to the countries' borders. The attendant costs, such as disruption in the countries' uniform approach to foreign countries in international litigation, appear acceptable. Additionally, Japan and the United States could thereby provide the world with a model for reform. In the short run, they could allow other countries to sign on, as other countries

79. See P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219 (1979); Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977).

80. See BORN, *supra* note 43, at 938 n.23.

81. See *supra* note 31.

82. See *supra* text accompanying note 52.

83. See *supra* note 40.

84. See *supra* note 26.

have expressed sincere interest in getting some agreement out of the Hague negotiations.⁸⁵ In the middle run, these two countries could pursue bilateral treaties with other partners. In the long run, when multilateral negotiations revive, as they surely will, Japan and the United States would have at the ready a treaty that could compete with the Brussels Regulation as a model.

Conclusion

"Oh, East is East, and West is West,"⁸⁶ but the twain meet regularly in international litigation. When they meet, despite surprisingly similar doctrine and outlook on matters of jurisdiction and judgments, Japanese and U.S. legal systems often "clash head-on":⁸⁷ jurisdictions overlap and judgments may not be respected, while parallel proceedings persist. With slight tweaking by a highly feasible bilateral agreement, the two systems could harmonize for a better tomorrow in which jurisdiction was allocated appropriately and judgments were respected accordingly, at least as between these two countries that otherwise share so much.

85. See, e.g., David Goddard, Rethinking the Judgments Convention: A Pacific Perspective 9 (2001) (manuscript on file with author) (a New Zealander also observing the necessity to Oceania that any jurisdiction and judgments convention be signed by Japan and the United States).

86. RUDYARD KIPLING, *The Ballad of East and West*, in RUDYARD KIPLING'S VERSE 268 (1927).

87. Masato Dogauchi, *Concurrent Litigations in Japan and the United States*, 37 JAP. ANN. INT'L L. 72, 72 (1994) (noting, however, the lack of real data).